IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

WEDNESDAY, THE 21ST FEBRUARY 2007 / 2ND PHALGUNA 1928

CRL.A.No. 964 of 2002()

SC.329/1999 of ADDL. SESSIONS COURT (ADHOC), KOZHIKODE

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APPELLANT: ACCUSED

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1. SASI, S/O.SREEDHARAN, AGED 42 YEARS,
   KANDANCHALIL HOUSE, CHEKKITTUPARA AMSOM,
   KOZHIKODE.

2. MATHEW, S/O.JOSEPH, AGED 37 YEARS,
   KOONATHANATH HOUSE, CHEKKITTUPARA AMSOM,
   KOZHIKODE.

3. JOSE S/O.JOSEPH, AGED 42 YEARS,
   PALLITHAZATH HOUSE, DO. DO.

4. JOSE S/O.THOMAS, AGED 41 YEARS,
   MALIYEKKAL HOUSE, DO DO

5. VIJAYAN, S/O.KUNHIKANNAN, AGED 39 YEARS,
   VAZHAPALLI HOUSE, DO DO.

BY ADV. SRI.VINOD VALLIKAPPAN

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.MUHAMMED PUZHAKKARA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

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Crl.A No. 964 of 2002

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Dated this the 21st day of February, 2007

J U D G M E N T

The accused, five in number, though were charged with the offence punishable under Section 55(a), 55(b) and 55(g) of the Abkari Act, in short the Act, they were acquitted of all the charges, except Section 55(g) of the Act. Therefore, all the accused were found guilty of the offence punishable under Section 55(g) of the Act, convicted and sentenced thereunder to undergo rigorous imprisonment for five years each and to pay a fine of rupees one lakh each, in default of which to undergo simple imprisonment for a further period of nine months. The said conviction and sentence are under challenge through this appeal.

2. The brief facts required for the disposal of this appeal are that on 18/04/1998, PW.2, the Sub Inspector of Peruvannamuzhi Police Station, along with PW.3 and others, were on duty. On information that illicit brewing of arrack was going on at Pakshikkunnu island, which is under the forest

department, the police party proceeded towards the isolated island, where the illicit brewing was going on. On seeing the police party, the accused-appellants threw away the apparatus and appliances used for the said purpose, jumped into the river, swam and escaped. The police party, under PW.2, inspected the premises and found nearly 3000 litres of wash, stored in kannases, tea boxes etc. together with nearly 10 litres of arrack. The other articles and apparatus, which could be used for the purpose of manufacturing of arrack, were also found. After preparing Exhibit P3 seizure mahazar and Exhibit P1 scene mahazar, the police party returned to the police station, with the material objects. Exhibit P6 is the First Information Statement and Exhibit P6(a) is the First Information Report, registered under Section 55(a), (b) and (g) of the Act. Though the appellants had jumped into the river, swam and escaped from the place of occurrence, PW.3, the Assistant Sub Inspector of Police, who was with PW.2, had identified the accused. Hence, the final report was accordingly filed by PW.2, on completion of the investigation, which was conducted by PW.6, the Sub Inspector of Perambra Police Station.

3. The prosecution examined six witnesses and marked eight documents. Six material objects were also marked and identified.

4. Though the court framed the charge under Section 55(a), (b) and (g) of the Act, on appreciation of the evidence, the court below came to the finding that there is no clear evidence to hold that the appellants committed the offence under Section 55(a) and (b) of the Act. Therefore, all of them were acquitted thereunder. However, considering that the evidence is sufficient to hold that the accused committed the offence punishable under Section 55(g) of the Act, they were convicted and sentenced thereunder.

5. Section 55(g) of the Act is reproduced below:-

> "55. Whoever in contravention of this Act or of any rule or order made under this Act
>
> (a) xxxx
>
> (b) xxxx
>
> (c) xxxx
>
> (d) xxxx
>
> (e) xxxx

(f) xxxx

(g) uses, keeps, or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing liquor other than toddy or any intoxicating drug; or

(h) xxxx

(i) xxxx

shall be punished xxxx"

6. The prosecution had produced six material objects. The evidence of PWs.1, 3 and 6 clearly show that these material objects were seized from the place of occurrence. Though PWs.1 and 2 had turned hostile, Exhibit P3 seizure mahazar reveals the seizure of the material objects from the place of occurrence, MO.6 being a white kannas, with arrack.

7. The learned counsel appearing for the appellant submitted that as possession of the materials stated in Section 55(a) and (b) of the Act were found to be not proved by the prosecution against the appellants, the conviction under Section 55(g) of the Act also is not sustainable.

8. Mere possession of liquor or intoxicating drug, in contravention of the Act, or manufacturing of liquor or intoxicating drug, are covered under Section 55(a) and 55(b) of the Act. On the other hand, as quoted above, Section 55(g) of the Act is very extensive and the possession of any materials, still, apparatus, utensil, implement and whatsoever, for the purpose of manufacturing liquor, is sufficient to attract the offence thereunder. The material objects seized and produced in this case are materials which are used for manufacturing liquor. MO.6 kannas had arrack in it. But as the possession of the same was not fastened on the appellants, the court did not convict them under Section 55(a) of the Act. However, the act alleged against the appellant, under Section 55(g) of the Act, is clearly proved. Therefore, for the reason that Section 55(a) and 55(b) of the Act were found not proved, Section 55(g) of the Act cannot be brushed aside.

9. The learned counsel for the appellant further contended that there is no materials to show that the accused had been identified by any of the witnesses. PW.3 is the Assistant Sub Inspector of Police of the same station, who

accompanied PW.2 and others, in the boat of the irrigation department, to the place of occurrence. He had clearly identified the appellants. PW.2 also spoke of the jumping and escaping by the appellants from the place of occurrence. The investigation of PW.6 further revealed that the appellants were involved in illicit distillation and they escaped from the place of occurrence after throwing away the apparatus and implements into the river. Therefore, no further identification is necessary in this case.

10. Learned counsel further submitted that even though the police party was in a boat of the irrigation department, they did not pursue the appellants, who jumped into the river in their bid to escape from the place of occurrence. PW.2 had been questioned on that point; so also were the other witnesses. PW.2 deposed that the boat was tied to a distant place on an another side of the bank of the tiny island, where the illicit brewing was going on. The police could not reach back the boat and chase the appellants.

11. The learned Public Prosecutor submitted that because of the marshy area it was not possible for the boat to be

driven through the places where the appellants escaped. The appellants were very familiar with the terrain of the area, as well as the differences in the depth of the water in the river.

12. When the prosecution established that it was the accused-appellants who did the criminal act, the mere inaction on the part of the police in not chasing the appellants, cannot be found to be a lapse on the prosecution. Therefore, I am unable to accept the contention of the learned counsel for the appellant in that regard.

13. The evidence adduced by the prosecution clearly show that the appellants were engaged in manufacturing of illicit liquor in an isolated island. It is a forest area. PW.2 deposed that the police party could identify the location only on seeing the smoke coming out of the area. When they reached the place of occurrence, the appellants escaped, by jumping into the river. As the boat was on the other side of the island, they could not immediately chase them.

14. The counsel for the appellants were at pains to explain that the distance to the main land, from the place of occurrence, was $1^1/_2$ kms. Therefore, a chase must have been

successful and the accused could have been arrested. PW.2 and others explain that as the boat was stationed at a distant place of the island and the appellants were proficient enough with the terrain, taking advantage of the depth differences in the river, they escaped. Therefore, there was no chance in pursuing the appellants, with the boat.

15. After appreciating the evidence, that are available on record, I do not find that I have to doubt the versions of the prosecution witnesses, in not chasing the accused, when they jumped into the river. When I appreciate the entire evidence, I find that the prosecution has established the offence under Section 55(g) of the Act. Therefore, the conviction entered into by the learned Additional Sessions Judge, Fast Track, (Ad hoc-I), Kozhikode, in Sessions Case No.329/1999, on the file of that court, is hereby sustained.

16. The learned counsel for the appellants, however, submits that the sentence of imprisonment for five years and a fine of rupees one lakh each, is highly excessive, and disproportionate to the criminal act proved against them.

17. After hearing the counsel for the appellants as well as the learned Public Prosecutor, and taking into account the circumstances of this case, I reduce the sentence from rigorous imprisonment for five years to rigorous imprisonment for one year each. However, I sustain the fine amount of rupees one lakh each. The default sentence, is reduced to simple imprisonment for six months each.

In the result, the appeal is allowed in part. The learned Sessions Judge is directed to issue modified warrants to the appellants, reducing the sentence of imprisonment to rigorous imprisonment for one year each, and the default sentence of fine being six months each, as above.

(J.M.JAMES)
Judge

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J.M.JAMES, J.

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J U D G M E N T

21st February, 2007